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Nos. 06-969 & 06-970

In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SENATOR JOHN MCCAIN, *et al.*, *Appellants*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Appellee's Response to Appellants' Jurisdictional Statements

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Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Statement

This appeal concerns an as-applied exception for three grassroots lobbying ads that the lower court held was constitutionally required for the "electioneering communication" prohibition contained in the Bipartisan Campaign Reform Act ("BCRA") of 2002. 2 U.S.C. §§ 434(f)(3) and 441b(a), (b)(2).

When the "electioneering communication" prohibition was proposed as an amendment to the BCRA, its sponsors explained that it would not prohibit grassroots lobbying. Senator Jeffords declared that his proposed prohibition:

> will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes. The last point bears repeating. The Snowe-Jeffords provisions do not stop the ability of any organization to urge their lawmakers on upcoming issues or votes. That is one of the biggest distortions of the Snowe-Jeffords provisions. Any organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provision, any organization still can undertake this most important task.

147 Cong. Rec. S2813 (March 23, 2001). Sen. Paul Wellstone offered an amendment, that would eliminate a statutory exemption in Snowe-Jeffords for nonprofit organizations (under I.R.C. §§ 501(c)(4) or 527), but agreed that grassroots lobbying was not to be banned:

> I am not talking about ads . . . that are legitimately trying to influence policy debates – rather, this amendment only targets those ads that we all know are trying to skew elections but until now have been able to skirt the law. I am not talking about legitimate policy ads. I am not talking about ads that run on any issue.

147 Cong. Rec. S2846 (March 26, 2001). Thus, it was the intent of Congress to exclude genuine grassroots lobbying from the "electioneering communication" prohibition and it left it to the Federal Election Commission ("FEC") to do so explicitly. 2 U.S.C. § 434(f)(3)(B)(iv).

Furthermore, it is the text of the broadcast ads themselves that determines whether the "electioneering communication" prohibition, or any exception, applies. An "electioneering communication" is defined solely based on its text: " the term 'electioneering communication' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office," § 434(f)(3)(A)(i)(I), when made in defined proximity to an election, § 434(f)(3)(A)(i)(II), and targeted to the relevant electorate. § 434(f)(3)(C). The statutory exemptions are based solely on the content of the communication: "a news story, commentary, or editorial distributed through the facilities of any broadcast station," "a communication which constitutes an expenditure or independent expenditure[1] under the Act," and "a candidate debate or forum." § 434(f)(3)(B)(i), (ii) and (iii).

In their explanations that the "electioneering communication" prohibition was not intended to encompass grassroots lobbying, the Congressional sponsors never referred to anything outside the content of the ads themselves. Sen. Jeffords assured "[a]ny organization," which includes incorporated civic groups and unions, that "*their grassroots communications*" were excluded from the prohibition. 147 Cong. Rec. S2813 (emphasis added). Sen. Wellstone assured them that "*ads* . . . that are legitimately trying to influence policy debates" and "legitimate policy *ads*" are excepted, because the prohibition "only targets

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[1]An "independent expenditure" is an expenditure which "expressly advocates the election or defeat of a clearly identified candidate." § 431(17)(A).

those *ads* that we all know are trying to skew elections." 147 Cong. Rec. S2846 (emphasis added).

When the FEC considered exceptions to the "electioneering communication" prohibition in 2002, it solicited comments on four proposed alternatives for a grassroots lobbying exemption. 67 Fed. Reg. 51131. The BCRA's prime sponsors proposed to the FEC specific wording for a grassroots lobbying exemption and told the FEC that it had authority to enact their rule under BCRA. *See Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002)) (available at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf) ("Prime Sponsors' Comments").

The BCRA prime sponsors saw the difference between electioneering and grassroots lobbying as hinging entirely on the content of the ad itself:

> The term "electioneering communication" does not include any communication that:
>
> ****
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication refers to the candidate only by use of the term "Your Congressman," "Your Senator," "Your Member of Congress" or a similar reference and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the

> communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy.

Prime Sponsors' Comments at 10. The FEC, however, failed to adopt any grassroots lobbying exception.

This Court reviewed the constitutionality of the "electioneering communication" prohibition, in *McConnell v. FEC*, and upheld it on its face because it was not substantially overbroad. 540 U.S. 93, 206-07 (2003). This Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," noting that the interests that support the BCRA "set[ ] it apart from the statute in *Bellotti* . . . and . . . *McIntyre*." 540 U.S. at 206 n.88. *First National Bank v. Bellotti*, 435 U.S. 765 (1978), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) involved grassroots lobbying rather than attempts to influence candidate elections.

This case presents the issue reserved in *McConnell*, whether the interests that support regulation of election-related speech are sufficient to also prohibit grassroots lobbying about upcoming votes in Congress. In the case's first trip to this Court, the Court held unanimously that neither the language nor the logic of *McConnell* precluded an as-applied challenge to the "electioneering communication" prohibition and remanded the case for a decision on the merits of Wisconsin Right to Life, Inc's ("WRTL") as-applied challenge. *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) ("*WRTL I*").

The BCRA sponsors (as intervening defendants here) and the FEC appeal the lower court's decision, on remand, that the electioneering communication prohibition is unconstitutional as

applied to WRTL's 2004 grassroots lobbying ads because "[i]n so concluding, the district court . . . focused solely on the face of the advertisements." Intervenors' JS at 2-3; *see also* FEC's JS at 16-17. The FEC wants the courts to examine external events to ferret out the subjective intent of WRTL in running the ads and their possible electoral effect, FEC's JS at 20-24, and the sponsors-Intervenors now argue that a grassroots lobbying exemption depends, not on the content of the ads, but on "the context of the Wisconsin senatorial race," including previous public statements by WRTL and its PAC, an expert's judgment as to the importance of the issue addressed in grassroots lobbying in the coincident election, the fact that the issue was mentioned in a poll taken by the Republican Party of Wisconsin, and other external factors. Intervenors' JS at 11, n.3. According to the dissenting Judge below, this will require a trial on the merits to resolve. *See* App. at 30a, 45a, 46a, 47a-48a.

When it was before this Court in *WRTL I*, the FEC denied that a communication's potential effect on an election gave it the power to prohibit it,[2] and the Intervenors' current position contradicts their assurances from the floor of Congress and is contrary to the exemption for grassroots lobbying that they themselves proposed in the 2002 FEC rulemaking.

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[2]In oral argument in *WRTL I*, Justice Scalia asked: "You think Congress has the power to prohibit any First Amendment . . . conduct that might have an impact on the election? I mean, is that the criterion for whether it . . . can be prohibited?" Transcript of Oral Argument at 31, *WRTL I*, 126 S. Ct. 1017 (No. 04-1581). The Solicitor General responded: "No, Justice Scalia, it's not. . . ." *Id.*

Discussion

This Court Should Note Probable Jurisdiction.

WRTL agrees that probable jurisdiction should be noted. A substantial question of federal law is raised by this case. A federal statute has been declared unconstitutional as applied to three grassroots lobbying ads that WRTL wished to run in 2004.[3] More importantly, the as-applied exception to the "electioneering communication" prohibition, announced by the lower court, is important to incorporated citizen groups and labor unions who wish to engage in grassroots lobbying during the "electioneering communication" period, a situation likely to regularly recur. *See* App 15a (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 793 (2003) (Leon, J.)).

A. The Lower Court Correctly Held That the "Electioneering Communication" Prohibition Could Not Be Constitutionally Applied to WRTL's Grassroots Lobbying Ads.

WRTL agrees that, as the lower court held, the Constitution precludes applying the "electioneering communication" prohibition to the three specific ads that WRTL wished to run in 2004, i.e. the "Wedding," "Loan," and "Waiting" ads. App. 3a-5a n.3, 4, and 5, respectively. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies," *Bellotti*, 435 U.S. at 791 n.31, and this

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[3]A second question is whether the familiar "capable of repetition yet evading review" exception to mootness applies in a challenge to the electioneering communication's application to grassroots lobbying. In September, 2006, "confronted with essentially the same issue," another three judge court in *Christian Civic League of Maine, Inc. v. FEC* held that the exception did not apply. App. 14a n.14. The lower court here "respectfully disagree[d]" with the holding by that court. That question is not specifically raised here and would best be answered by the Court in the *Christian Civic League of Maine, Inc. v. FEC* case. No. 06-589.

Court has not found any governmental interest sufficient to prohibit it. *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *see also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("the right to petition extends to all departments of the government"). Furthermore, grassroots lobbying ads are a type of genuine issue advertising, which is not the functional equivalent of express advocacy, as the district court correctly held. *See* App. 25a.

The lower court was also correct when it "limit[ed] its consideration to language within the four corners of the anti-filibuster ads," App. 22a, to determine whether the ads should be exempt from the prohibition. The court was doing exactly what Congress itself did in defining an "electioneering communication" and what the BCRA sponsors, now Intervenors, did in crafting their own proposed grassroots lobbying exception to the prohibition. Both looked only at the content of the communication.

Furthermore, this Court has long rejected the notion that the intent or effect of a communication can be the basis of prohibiting it since this would make speech dependent on the hearers' subjective judgment:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley v. Valeo, 424 U.S. 1, 43 (1976) (internal quotation marks and citation omitted). This applies equally to grassroots lobbying, which is "'a concerted effort to influence public

officials *regardless of intent or purpose.*'" *BE & K*, 536 U.S. at 525 (*quoting Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)) (emphasis added).

B. A Decision from Which General Guidance Can Be Derived Is Needed from this Court.

If the Court agrees with the lower court's decision, incorporated citizen groups, labor unions, and the courts will greatly benefit from this Court's decision before the next blackout period begins. A decision from this Court would likely set out the critical factors for a broadcast ad to qualify for a grassroots lobbying exception so that the regulated public would know with some certainty the circumstances under which they may now use broadcast ads to lobby members of Congress about upcoming votes in Congress. This Court has done so in the past. *See, e.g.*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986) ("*MCFL*") (holding of general applicability as to MCFL-corporations, which are exempt from the corporate prohibition).

Without such a holding, incorporated citizen groups and labor unions seeking protection for materially-similar ads must bring "as-applied challenges . . . on an emergency basis."App. 18a. *See also id.* at 19a ("as-applied challenges, to be effective, must be conducted during the expedited circumstances of the closing days of a campaign."). "The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Storer v. Brown*, 415 U.S. 724, 738 n.8 (1974). Likewise, a decision from this Court from which general guidance could be derived will inform any efforts by the FEC to promulgate a rule exempting grassroots lobbying such as WRTL's from regulation under the "electioneering communication" prohibition. *See WRTL I*, 126 S. Ct. at 1017 ("Although the FEC has statutory

authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.").

C. This Court Should Review Whether the Scope of the Exception Announced Below Is Constitutionally Sufficient.

As to the scope of the exception required by the Constitution, the lower court gave well-reasoned guidance to citizen groups, unions, and other courts as to the applicability of the exception it has announced, such as limiting the constitutional evaluation of the ads in question to their four corners, App. 18a-22a, and the criteria used to establish that the ads were not the functional equivalent of express advocacy. App. 22a-24a. But this Court, as the final arbiter of the Constitution's requirements, should review the lower court's analysis to make sure that the exception for grassroots lobbying created by its analysis comports with the protection afforded speech and the right to petition by the First Amendment.

Conclusion

This Court should note probable jurisdiction. The briefing schedule should allow the Court to reach its decision this term.[4]

Respectfully submitted,

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[4]In this regard, WRTL agrees with the proposed briefing schedule outlined in footnote 1 of Response of the Federal Election Commission to Appellee's Motion to Expedite and to Advance on the Docket.